

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 28

DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES - Review of condominiums by Department of Health and Environmental Sciences under Sanitation in Subdivisions Act;

LAND DEVELOPMENT - Review of condominiums by Department of Health and Environmental Sciences under Sanitation in Subdivisions Act;

SEWAGE - Review of condominiums by Department of Health and Environmental Sciences under Sanitation in Subdivisions Act;

SUBDIVISIONS - Review of condominiums by Department of Health and Environmental Sciences under Sanitation in Subdivisions Act;

MONTANA CODE ANNOTATED - Title 76, chapter 3, Title 76, chapter 4;

OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 14.

- HELD:
1. Condominiums, including those that do not provide "permanent multiple space for recreational camping vehicles or mobile homes," are "subdivisions" and therefore subject to review by the Department of Health and Environmental Sciences under the provisions of the Sanitation in Subdivisions Act, Title 76, ch. 4, MCA.
 2. The Department of Health and Environmental Sciences is required to review condominiums including those condominiums to be constructed

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on parcels of land that fall outside the definition of subdivision.

3. The Department of Health and Environmental Sciences' authority to review condominiums includes condominiums to be constructed on parcels of land subdivided before the enactment of the Sanitation in Subdivisions Act.
4. The Department's authority to review condominiums includes condominiums to be built on parcels of land previously approved by the Department for uses not including condominiums.

28 July 1981

John W. Bartlett, Deputy Director
Department of Health and
Environmental Sciences
Cogswell Building
Helena, Montana 59620

Dear Mr. Bartlett:

You have requested my opinion on the following questions:

- I. Are condominiums that do not provide "permanent multiple space for recreational camping vehicles or mobile homes" "subdivisions" and therefore subject to review by the Department of Health and Environmental Sciences under the provisions of the Sanitation in Subdivisions Act, Title 76, chapter 4, MCA?
- II. Is the Department of Health and Environmental Sciences required to review condominiums to be constructed on parcels of land that fall outside the definition of subdivision?
- III. Is the Department of Health and Environmental Sciences required to review condominiums to be constructed on parcels

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of land subdivided before the enactment of the Sanitation in Subdivisions Act, 1961 Mont. Laws, ch. 95?

- IV. Is the Department of Health and Environmental Sciences required to review a condominium to be built on a parcel of land previously approved by the Department for a use not including condominiums?

The application of the Sanitation in Subdivisions Act to condominiums has not arisen often in Montana. However, the increasing preference for this form of real estate ownership has raised questions concerning the precise status of condominiums under the Act.

I.

Because of the awkward wording of the definition of "subdivision" in the Sanitation in Subdivisions Act, it is not altogether clear whether the definition includes all condominiums or an extremely small class of condominiums. Section 76-4-102(7), MCA, provides:

"Subdivision" means a division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision and any condominium or area, regardless of size, which provides permanent multiple space for recreational camping vehicles or mobile homes.

The particular ambiguity at the heart of your question arises because it is not clear whether the phrase "regardless of size, which provides permanent multiple space for recreational camping vehicles or mobile homes" refers only to one antecedent, "area," or to all antecedents, "any resubdivision and any condominium or area." I conclude that the phrase refers to only one antecedent, "area."

This conclusion is consistent with the interpretation found in a recent Attorney General's Opinion construing identical language found in the Montana Subdivision and

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Platting Act, Title 76, ch. 3, MCA. In 39 Op. Att'y Gen. No. 14 (April 27, 1981), I stated:

On its face this section provides that the following activities are deemed to be subdivisions:

1. A division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed.
2. Any resubdivision.
3. Any condominium.
4. Any area, regardless of size, which provides or will provide multiple space for recreational camping vehicles.
5. Any area, regardless of size, which provides or will provide multiple space for mobile homes.

This construction is supported by a number of rationales.

First, construing the definition of "subdivision" in this manner liberally construes the term "condominium." As the Montana Supreme Court noted in State ex rel. Florence-Carlton School District v. Board of County Commissioners of Ravalli County, ___ Mont. ___, 590 P.2d 602, 605 (1978):

Legislation enacted for the promotion of public health, safety, and general welfare, is entitled to "liberal construction with a view towards the accomplishment of its highly beneficent objectives."

It is clear that the lease or sale of space for use by recreational vehicles or mobile homes on a combination of individual and common ownership basis may possibly occur in contemporary real estate practice. Nonetheless, the term condominium has a broader meaning

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and can include a variety of structural and ownership arrangements such as townhouses, multiple family dwellings, or multi-unit dwellings sold on a time-share or interval ownership basis.

In recent years..."condominium" has come to refer specifically to a multiunit dwelling, each of whose residents (unit owners) enjoys exclusive ownership of his individual apartment or unit, holding a fee simple title thereto, while retaining an undivided interest, as a tenant in common, in the common facilities and areas of the building and grounds which are used by all the residents of the condominium.

Typically, a condominium consists of an apartment house in which the units consist of individual apartments and the common areas consist of the remainder of the building and grounds.

15A Am. Jur. 2d Condominiums and Co-operative Apartments
§ 1 (1976).

It is significant to note that the inclusion of "condominium" in the Sanitation in Subdivisions Act occurred in 1973. At the Senate and House hearing on HB 465, which included this language, the Department of Health and Environmental Sciences offered testimony in support of the amendments including the following:

In recent years, there has been developed a new form of selling property known as the condominium. In this method, each person buying an apartment, lot or residence also obtains an interest in all of the land surrounding the development. In several subdivisions, the purchasers are buying small lots with the understanding that they will have the benefits of large tracts of land surrounding each lot for their recreational use. In some instances, utilities such as wells or drainfields are being installed in the community or open space areas. At the present time, there is no way to control such developments except where each individual lot site is platted and filed.

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Thus, it was clearly understood by the Legislature at that time that the broader definition of condominium was intended.

This interpretation is consistent with the public policy stated in section 76-4-101, MCA.

It is the public policy of this state to extend present laws controlling water supply, sewage disposal, and solid waste disposal to include individual wells affected by adjoining sewage disposal and individual sewage systems to protect the quality and potability of water for public water supplies and domestic uses and to protect the quality of water for other beneficial uses, including uses relating to agriculture, industry, recreation, and wildlife.

This expression of legislative concern regarding water supply, sewage disposal, and solid waste disposal logically includes concern for the impact of the high density development that is characteristic of condominiums. Another rationale supporting the conclusion that the qualifying phrase in the definition of "subdivision" applies only to the word "area" involves the application of well-established rules of statutory construction. In a recent case, the Montana Supreme Court noted that "...a relative clause must be construed to relate to the nearest antecedent that will make sense." [Citations omitted.] Dussault v. Hjelm, ___ Mont. ___, 627 P.2d 1237, 1239 (1981). Applied to the definition of subdivision, this rule supports the conclusion that the phrase "regardless of size, which provides permanent multiple space for recreational camping vehicles or mobile homes" only applies to the antecedent "area."

In reaching this conclusion I have given careful consideration to the arguments that have been presented in support of an alternative conclusion. I will briefly address one such argument, that a condominium is a division of a building under section 76-3-204, MCA, and therefore exempt from review under section 76-4-125, MCA, and state my reasons for rejecting it.

Section 76-4-125(2), MCA, provides in pertinent part:

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(2) A subdivision excluded from the provisions of chapter 3 shall be submitted for review by the department according to the provisions of this part, except that the following divisions are not subject to review by the department:

(a) the exclusions cited in 76-3-201 and 76-3-204;

Proponents of a narrow construction of the definition of "subdivision," i.e., limiting the reference to "condominium" to an extremely narrow class of condominiums, argue that section 76-3-204, MCA, exempts the larger class of condominiums from review by the Department. Section 76-3-204, MCA, provides:

The sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter.

It is relevant to note that the preceding section, section 76-3-203, MCA, refers specifically to "condominiums." It provides:

Condominiums constructed on land divided in compliance with this chapter are exempt from the provisions of this chapter.

If section 76-3-204, MCA, is a further exemption for condominiums, as has been suggested, the Legislature should have used consistent terminology throughout and referred to condominiums specifically in creating the latter exemption. Since the Legislature did not use consistent terminology I must conclude that section 76-3-204, MCA, refers to something other than condominiums and that the section does not exempt condominiums from review, in light of the compelling arguments supporting inclusion.

II.

Your next question concerns whether a condominium to be constructed on a parcel of land containing twenty (20)

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acres or more is subject to review by the Department. I conclude that it is.

The definition of "subdivision" found in section 76-4-102(7), MCA, encompasses divisions of land containing less than twenty (20) acres "and includes any resubdivision and any condominium." [Emphasis added.] "Resubdivision" is simply a class within the larger definition of "subdivision" comprising those subdivisions that have been previously divided. Likewise, "condominium" is an additional independent class expressly included in the definition of "subdivision." This interpretation is consistent with legislative concern respecting developments where more dense populations result in more intense water and sewer usage thereby prompting concern for public health. It is also consistent with the construction expressed in my recent opinion concerning the Montana Subdivision and Platting Act and section 76-4-103, MCA. See 39 Op. Att'y Gen. No. 14 (April 27, 1981).

III.

You have also asked about the effect of the exemption codified in section 76-4-111, MCA, which provides that "[c]ondominiums constructed on land divided in compliance with the Montana Subdivision and Platting Act and this part are exempt from the provisions of this part." That section is intended to cover instances where construction of condominiums on a site specifically approved for that use does not commence until a time significantly later than the approval. The effect of the statute, under this construction, is to remove the need for any subsequent review of parcels already approved for condominiums. This result is consistent with the intent of the Sanitation in Subdivisions Act.

A related question arising under section 76-4-111, MCA, is whether the exemption exempts from review land that was divided prior to enactment of the Sanitation in Subdivisions Act and the Subdivision and Platting Act. The question is based on the theory that the impossibility of compliance with a not yet enacted act is somehow the same as complying with the act. I conclude that it is not.

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The fact that a division occurred prior to enactment of the Sanitation in Subdivisions Act thereby rendering technical noncompliance with the Act impossible is not the same as being "in compliance" with the Act. In most instances, land that was divided prior to the enactment of these statutes is not subject to review under either act. However, since condominiums as a class are subject to review under the Act, the fact that they may be built on parcels of land first divided years ago does not affect the review requirement triggered by the new development.

IV.

Finally you have asked whether a previously reviewed subdivision is subject to a second review when the intended use of the parcel is changed, e.g., for condominiums. I conclude that consistent with the general purpose of the Act, such a subdivision constitutes a new subdivision by definition and is therefore subject to review under the express terms of the Sanitation in Subdivisions Act.

It stands to reason that a significant change in the intended use of a parcel of land alters the basis for approval. Where the nature and size of the intended development is substantially different from that which was reasonably expected, the Act clearly contemplates a review of the new use to assure property owners a safe dependable water supply system, a nonpolluting reliable sewage treatment system, and a licensed solid waste disposal site in order to protect the quality and potability of water supplies outside of the subdivisions and to preserve the quality of adjacent water for other beneficial uses.

THEREFORE, IT IS MY OPINION:

1. Condominiums, including those that do not provide "permanent multiple space for recreational camping vehicles or mobile homes," are "subdivisions" and therefore subject to review by the Department of Health and Environmental Sciences under the provisions of the Sanitation in Subdivisions Act, Title 76, ch. 4, MCA.
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including those condominiums to be constructed on parcels of land that fall outside the definition of subdivision.

3. The Department of Health and Environmental Sciences' authority to review condominiums includes condominiums to be constructed on parcels of land subdivided before the enactment of the Sanitation in Subdivisions Act.
4. The Department's authority to review condominiums includes condominiums to be built on parcels of land previously approved by the Department for uses not including condominiums.

Very truly yours,

MIKE GREELY
Attorney General